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No. 81-8

In the Supreme Court of the United States

OCTOBER TERM, 1980

DOROTHY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the warrant authorizing a search of the office of petitioner's husband described the things to be seized with the particularity required by the Fourth Amendment.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a) is unreported. The opinions of the district court (Pet. App. 11a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1981, and the petition for a writ of certiorari was filed on July 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted on 18 counts of presenting false Medicaid claims, in violation of 18 U.S.C. 287; six counts of making false statements in a matter within the jurisdiction of the United States, in violation of 18 U.S.C. 1001; and six counts of mail

fraud, in violation of 18 U.S.C. 1341 (Pet. App. 23a-40a, 50a). Petitioner's husband, Dr. William J. Brown, stood trial with her on the same 50-count indictment but was acquitted on all counts. Petitioner was fined $3,000 and sentenced to a one-year term of imprisonment, which was suspended in favor of two years' probation (*id.* at 50a).

2. The issue raised by petitioner concerns a search warrant that authorized a search of Dr. Brown's office for

> records, books and accounts pertaining to the following:
>
> Patient Medical Charts
> Daily Log sheets—"Day Sheets"
> Patient ledger sheets
> Insurance claim forms
>
> which are in violation of Title 18, United States Code, Section 1001

(Pet. App. 20a).

The search warrant was based upon the affidavit (Pet. App. 17a-19a) of Deirdre Flannery, an HEW program integrity officer. The affidavit recorded the reports of three of Dr. Brown's patients, who complained that Medicare had been billed for services they had not received (*id.* at 18a, 19a). Two former billing clerks reported that Mrs. Brown directed them to prepare false Medicare claims (*id.* at 18a). One of them also stated that Mrs. Brown, in response to an upcoming Blue Shield audit, rewrote all the files and concealed the originals (*ibid.*).

Before the warrant was executed, Flannery showed the agents who assisted her what the relevant insurance and medical forms looked like (Pet. App. 66a-67a). Approximately 1,676 patient files were seized, each of which apparently contained forms falling into one or more of the four categories listed in the warrant (*id.* at 13a). Not all the files,

however, concerned patients for whom payment was sought under Medicare or Medicaid, and many of the files contained documents in addition to those specified in the warrant (*id.* at 14a). In the two months after the search, Flannery reviewed the files and returned those not pertinent to the investigation (*id.* at 69a-70a). In the meantime, Dr. Brown was provided with copies of all files that remained in federal custody (*id.* at 43a, 69a).

3. Before an indictment was returned, Dr. Brown moved unsuccessfully under Fed. R. Crim. P 41 for the return of the seized property and the suppression of evidence. The district court rejected his argument that the warrant lacked the particularity required by the Fourth Amendment and stated that the warrant "explicitly identified the items sought, and was limited to those records relevant to the Medicare issue" (Pet. App. 6a-7a).

After the indictment was filed, petitioner and Dr. Brown[1] again moved for return of the seized property and suppression of evidence. The district court judge to whom the criminal case had been assigned adopted the previous judge's opinion and denied the motion (Pet. App. 10a). The court also denied a mid-trial motion for reconsideration based upon *United States* v. *Abrams*, 615 F. 2d 541 (1st Cir. 1980), stating that the *Abrams* warrant lacked the "saving particularity" of the warrant in this case (Pet. App. 12a). The court did, however, exclude two categories of evidence the seizure of which was not authorized by the search warrant: documents not falling within the four classes listed in the warrant and documents from files containing no indication of federal involvement that would make 18 U.S.C. 1001 applicable (Pet. App. 4a).

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[1]Neither at trial nor on appeal did the government contend that petitioner's own Fourth Amendment rights were not implicated by the search of her husband's office.

4. The court of appeals affirmed petitioner's conviction by judgment order with one judge dissenting. The judgment order stated that the court found the search warrant "sufficiently specific in its description of the things to be seized" (*id.* at 1a).

ARGUMENT

Petitioner contends (Pet. 5-19) that the judgment of the court of appeals is in conflict with decisions of other circuits and with decisions of this Court. In fact, however, there is no conflict among the circuits, and the issue she asks the Court to review entails little more than the application of generally agreed legal principles to the specific facts of her case. There is thus no occasion for further review by this Court.

1. There is no conflict between the decision below and the decisions of other circuits upon which petitioner relies. Those cases involved less specifically worded search warrants, and the decisions turned upon the precise wording of the warrants.

Petitioner places principal reliance upon *United States* v. *Abrams*, 615 F. 2d 541 (1st Cir. 1980), a prosecution for Medicaid fraud with superficial factual similarities to the present case. In *Abrams*, however, the warrant contained "no description as to what specific records [were] to be seized" but instead authorized the seizure of all "business and billing and medical records * * * which show actual medical services performed and fraudulent services claimed to have been performed in a scheme to defraud the United States * * *." *Id.* at 542, 543. The warrant here, by contrast, listed the four categories of relevant records.

The other cases upon which petitioner relies are also readily distinguishable. In *Application of Lafayette Academy Inc.*, 610 F. 2d 1 (1st Cir. 1979), "[t]he warrant

[was] framed to allow seizure of most every sort of book or paper at the described premises, limited only by the qualification that the seized item be evidence of violations of [certain statutes which] penalize a very wide range of frauds and conspiracies." *Id.* at 3.

In three other cases upon which petitioner relies (Pet. 11, 14)—*Montilla Records of Puerto Rico, Inc.* v. *Morales*, 575 F. 2d 324 (1st Cir. 1978); *United States* v. *Klein*, 565 F. 2d 183 (1st Cir. 1977); and *United States* v. *Drebin*, 557 F. 2d 1316 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978)—the warrants instructed the executing officers to take items produced in violation of copyright laws, but the warrants provided no safeguards to insure that the executing officer would be able to differentiate an illegally produced item from one manufactured lawfully.

Similarly, in *United States* v. *Marti*, 421 F. 2d 1263 (2d Cir. 1970), the court struck down a warrant that directed the seizure of obscene materials but failed to provide any further guidance to the executing officer.

In two of the cases cited by the petitioner, warrants were found deficient because the class of items listed for seizure exceeded the scope of the showing of probable cause. In *VonderAhe* v. *Howland*, 508 F. 2d 364 (9th Cir. 1974), there was probable cause to seize certain records contained on yellow sheets and green cards, but the warrant sanctioned the seizure of a larger category of documents.[2] And in *United States* v. *Roche*, 614 F. 2d 6 (1st Cir. 1980), there was probable cause to seize documents relating to motor vehicle insurance, but the warrant "authorized the seizure

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[2]The court suppressed only those records not contained on yellow sheets and green cards.

of a far broader class of documents pertaining to all types of insurance."[3] *Id.* at 7.

2. Petitioner also maintains (Pet. 16-19) that the decision in this case conflicts with decisions of this Court, but her argument is erroneous. She contends that the warrant violated long-established precedent by "[leaving] it up to the executing officers to determine which documents violated the law and should be seized" (Pet. 17). As noted, however, the warrant listed the four particular categories of documents to be seized.

She also claims that the decision below is inconsistent with *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961). That case held that due process was violated by a state procedure that authorized the issuance, upon complaint, of a warrant to search for "obscene" materials. The resulting warrants left it almost entirely to the discretion of the executing officers to determine which materials were obscene. *Id.* at 732. There is no similarity between those warrants and the particularized warrant in this case.

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[3] *Pieper* v. *United States*, 604 F. 2d 1131 (8th Cir. 1979), cited by petitioner (Pet. 15), is inapposite. The only issue on appeal was whether the district court had correctly refused to exercise its equitable jurisdiction to entertain a motion to quash a search warrant and suppress seized evidence. Because Pieper could challenge the subpoena in the administrative action brought subsequent to the search, the district court held that he had an adequate remedy at law and refused to exercise jurisdiction. The court of appeals affirmed. 604 F. 2d at 1134.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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